73-1147

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IN THE

# Supreme Court of the United States

## 73-1147

October Term, 1973

EDWARD VOGT,

Petitioner,

-against-

RUSSELL G. OSWALD, Commissioner of the New York Department of Correctional Services,

and

J. E. LAVALLEE, Superintendent, Clinton Correctional Facility, Dannemora, New York,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit rendered in the above entitled case on November 14, 1973.

That decision affirmed the decision of Judge Edmund Port of the United States District Court for the Northern District of New York, denying a Petition for a Writ of Habeas Corpus. Judge Port's decision was rendered on February 27, 1973.

Petitioner was convicted of murder in the Supreme Court of the State of New York on August 7, 1961.

## Jurisdiction

The decision of the United States Court of Appeals was rendered on November 14, 1973. No request for an extension of time to file this petition has been made. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

## Questions Presented

1. Was the Petitioner's conviction

for murder in the first degree obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States in that involuntary statements made by him were admitted into evidence of trial.

2. Was the Petitioner denied access to counsel while in the custody and under the duress of Police and Prosecutorial authorities.

3. Was the Petitioner denied effective assistance of counsel at the "Huntley" hearing brought to test the voluntariness of his statements to authorities.

4. Did the procedure followed at the Petitioner's post-trial "Huntley" hearing to determine the voluntariness of his alleged confession violate the Fourteenth Amendment to the Constitution of the United States.

## Constitutional Provisions Involved

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment: Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any States legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection

or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## Statement of the Case

The Petitioner, Edward Vogt, was convicted in the Supreme Court of the State of New York of the murder in the first degree of Robert Guittari. The original judgment was rendered in the Supreme Court in New York County on August 7, 1961.

The original conviction was affirmed

by the Appellate Division in People v. Vogt, 19 A.D. 2d, 696, 241, N.Y.S. 1007 (1st Dept. 1963).

The Court of Appeals withheld decision and remitted the case to the trial court for a "Huntley Hearing". People v. Vogt, 15 N.Y. 2d 726, 256 N.Y.S. 2d 938 (1965). After a "Huntley Hearing", Justice Joseph Sarafite found the contested statements to have been voluntarily made, and an order was entered to that effect on October 26, 1965. The Appellate Division affirmed the order. People v. Vogt, 31 A.D. 787, 298 N.Y.S. 2d 461 (1st Dept. 1969). The Court of Appeals affirmed. People v. Vogt, 27 N.Y. 2d 955, 318 N.Y.S. 2d 324 (1970).

Petitioner-Appellant then sought a Writ of Habeas Corpus in the United States District Court for the Northern District of New York. The petition was denied by Judge Edmund Port on Febru-

ary 27, 1973. A Certificate of Probable Cause to Appeal was granted on March 16, 1973. An appeal was taken to the United States Court of Appeals for the Second Circuit. On November 14, 1973 the Court of Appeals affirmed the decision of Judge Port.

On the evening of December 23, 1960 at approximately 7:30 P.M., Robert Guittari was found stabbed to death on the landing between the sixth floor and the roof of the apartment house at 25 Cooper Street, New York, New York.

On December 27, 1960 at about 3:00 P.M. the Petitioner-Appellant Edward Vogt was taken from his home and brought to the 34th Precinct Stationhouse by Detectives Gormley and Brady. (1685, 543)*R

At the time the Petitioner-Appellant

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*References are to the record of the trial and hearing. (R-trial; H-Hearing)

was taken into custody he was seventeen years old and had dropped out of Junior High School. He had an I.Q. of 81, i.e., he had the mental development of an average eleven year old. (1572)R The Petitioner's father was dead and he lived with his mother and three younger brothers in Manhattan. At school he suffered vague aches and pains, later diagnosed as being related to his basic intellectual incapacity. His life at school had been marred by periodic ridicule from his class mates and consistent failure to produce adequate academic work. (1573)R

In 1957, Petitioner-Appellant made three or four visits to the psychiatric division of the Columbia Presbyterian Medical Center, and in 1959, four or five visits to the psychiatric clinic at Bellevue Hospital. He was also

examined at the Charities Psychiatric Center in New York City.

Tests administered to the petitioner showed:

1. His mental age was significantly below his actual chronological age.

2. His intelligence scale showed poor general information and comprehension of social principles (equal to those of someone nine years old.)

3. His responses to interviewing reflected a propensity to articulate his observations in verbal absurdities. (1572)R

At trial, Dr. Colter Rule, a court-appointed psychiatrist, testified that petitioner had a sociopathic personality and suffered from an inability, on a number of levels, to adjust to society. (1607)R Moreover, Dr. Rule testified that he believed that petitioner could

have confessed to a crime he did not commit. (1609, 1610)R

On December 27, 1960 when the officers brought the petitioner to the precinct, he was taken into the office of Lt. Michael Willis, who was in charge of the investigation.

Five other detectives, Deputy Inspector Thomas Callen, Supervisor of Detectives, Manhattan North Detective Borough Office; Sergeant Thomas Buzanga, of the Manhattan North Homicide Squad; Detective James Farrell of the 34th Squad; Detective Joseph Brady of the 34th Squad; and Detective Hennessy of the Manhattan North Homicide Squad were present in the Lieutenant's office when the questioning began. (525, 1691)R

Lt. Willis testified that petitioner was questioned for an hour, with all six detectives present. (530)R The lieutenant stated that the questioning

at first focussed on petitioner's background (526)R and then moved to his activities on the day of the murder. The petitioner was questioned as to whether or not he knew the deceased. (530)R Lieutenant Willis testified that petitioner's story was challenged by the detective. Willis told petitioner that other persons had given different stories about Vogt's activities on December 23, 1960. This entire line of questioning was later admitted to be a ruse played on the young suspect. (606)R

Lt. Willis further testified that petitioner asked to speak to Detective Brady alone rather than to a crowd of officers. (527)R This was done, but the detectives did not find it fruitful. (528)R The questioning was resumed with all six detectives present. At about 4:00 P.M. petitioner asked to be alone with Lt. Willis. (544)R By

5:15 P.M., according to Willis, petitioner had related to him the circumstances of the murder and how he had committed it. (607)R According to Detective Brady, Willis was alone with Edward Vogt for only thirty to thirty-five minutes. (1698)R

Petitioner-Appellant testified in his own behalf that he was innocent and that he made the alleged confessions because he was in fear. (1186, 1187, 1190)R He said that he was threatened with being thrown out of the window and that Lt. Willis said they "would beat the shit out of him". (1180)R

Petitioner further testified that he was familiar with the murder because he read about it in the newspapers (1172)R, and that Lt. Willis started telling him about the murder. (1187, 1188)R

Lt. Willis admitted that before the defendant related the confession to the

other detectives at the stationhouse he (Willis) gave an account of Vogt's alleged confession to the other officers with Vogt merely agreeing to it. (561)R

At approximately 6:00 P.M., petitioner was taken by eight or nine detectives from the precinct to his home at 15 Cooper Street. (564)R The many news reporters and photographers who had been at the stationhouse all day were also present at the Vogt home. While at the Vogt home, the detectives removed certain articles of petitioner's clothing from the premises. These items were later introduced in evidence. (569)R

At the Huntley Hearing, William Vogt, a cousin of the petitioner, testified that he was at the petitioner's home on December 27, 1960, when the petitioner was brought there by the police. William Vogt stated that when the police asked petitioner to tell his mother what he

had told the police, Edward hesitated, and a police detective then took an object which looked like a flashlight and poked it in the back of petitioner and said to him, "Tell her, tell her, tell her what you said, what you told us." (21, 22)H

From his home the petitioner was taken to the scene of the crime at 25 Cooper Street where he was made to reenact the killing. (570)R According to Willis, the entourage arrived back in the precinct station by 7:00 P.M.

At approximately 8:00 P.M. Lt. Willis became aware of the presence of attorney William A. Kummer at the stationhouse and of Kummer's request to see petitioner. Willis arbitrarily refused this request of counsel and Kummer was not permitted to see petitioner until the booking at 11:00 P.M. (610)R

An Assistant District Attorney arrived at the police station at about 9:15 P.M. to take a written statement from petitioner. (982)R The taking of this statement lasted about 45 minutes. (982)R All reference to the taking of this statement was struck out by the Court, (1060)R since petitioner's attorney, present at the stationhouse, was denied access to him.

Lt. Willis testified that petitioner could have walked out of the stationhouse during the early questioning. (597)R But it was established that the petitioner-appellant was accompanied by a policeman when he went to the bathroom and that he was handcuffed during the excursion to his home and the murder scene. (606)R

After he was booked, the appellant was treated at Jewish Memorial Hospital

for an injured ankle. A nurse, Mrs. Frances Maxwell testified that the appellant said he had hurt his leg going over a roof. The alleged statement was made while a number of police officers were with Vogt. The nurse admitted on cross-examination that the statement about the injury might have been made by a detective. (811-813, 827)R

At the "Huntley" Hearing, William Kummer, the attorney originally retained by Vogt's mother, testified that he arrived at the stationhouse at 7:40 P.M., at which time Vogt was being held. Kummer was not permitted to speak or advise petitioner-appellant until 11:45 P.M. after Vogt had already been booked. (14, 15)H

## REASONS FOR GRANTING THE WRIT

I. The interrogation and conviction of Edward Vogt occurred prior to the landmark decisions of the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964).

The pre-Escobedo and Miranda standard for determining the voluntariness of a confession requires consideration of the totality of the circumstances surrounding the admission or confession. Psycological compulsion or pressure, particularly where the subject is immature, is sufficient to render statements involuntarily. United States ex rel Castro v. LaVallee, 282 F. Supp. 718 (S.D.N.Y. 1968); Gallegos v. Colorado, 370 U.S.49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

The totality of all of the surrounding circumstances must be considered in order to determine if the confession or statements were "the product of an essentially free and unconstrained choice on his part". U.S. ex rel Castro v. LaVallee, 282 F. Supp. at 728, U.S. ex rel Delle Rose v. LaVallee, 342 F. Supp. 567 (1972).

The duress, pressure, and psychological compulsion to which the petitioner-appellant was subjected reflect a compassionless, coercive effort sustained against this callow youth in extracting the statements used to convict him of murder in the first degree. Over nine hours in police custody, repeated and extended interrogation by sometimes six and seven police officers, frightening threats, and the utter isolation of this youth in this context, as measured against his age, mentality, and psycholo-

gical background, strike a balance away from any standard of fair play and justice.

The laws that govern the limits of action of law enforcement officials are intended to protect both the integrity of the criminal justice process as well as those citizens who become subject to it. The process to which petitioner was subjected violates the barest standards by which a system seeking justice can administer its power and force over those who are exposed and vulnerable to it.

Limits in the actions of law enforcement officials must be especially precise when the subject under investigation is a youth or a person with diminished mental capacity. These individuals are particularly vulnerable to subtle pressures which might not appear

severe to a grown citizen of normal intelligence.

Two points which did not receive the consideration they deserve during the State court proceedings are (1) that Vogt was in police custody for some eight hours before being booked and (2) that Lt. Willis testified that he gave a resume of Vogt's confession to the other detectives with Vogt's mere agreement before Vogt himself recapitulated the statements.

Regarding point (1) above, it is significant that, even if police testimony placing Vogt's initial admissions at 4:30 or 5:00 P.M. that afternoon is accepted, their subsequent actions after this are clearly coercive. First they brought Vogt to his home where he was literally prodded into making further admissions to his mother; the detectives then took him to the scene of the crime

to re-enact it, and finally, they returned to the stationhouse for still further interrogation.

Such conduct provides the inference that the police were not satisfied that Vogt's admissions were sufficient. This inference is buttressed by the fact that young Vogt was not booked until 11:00 P.M. that night - some nine hours after initially being taken into police custody and six and a half hours after he is said to have made his incriminating admissions.

People ex rel Castro, supra, is relevant to both issues (1) and (2) mentioned above.

> Yet the police continued their intermittent or periodic, interrogation of him throughout the night, not merely for the purpose of 'gilding the lily', but apparently because they were not satisfied with the information theretofore obtained and were seeking incriminating disclosures believed to be essential to their case to the

> point where the ultimate recorded question and answer statement was obtained with the aid of leading questions at crucial points.
>
> 282 F. Supp. at 728.

In reversing a conviction because psychological pressure was used in obtaining a confession, Chief Justice Warren, speaking for the Supreme Court in Spano v. N.Y., 360 U.S. 315 (1959), stated:

> He did not make a narrative statement but was subject to the leading questions and answer confession. He was subjected to questioning not by a few men, but by many ... [T]he effect of such massive official interrogation must have been felt.
>
> 360 U.S. at 322.

In this case Lt. Willis recited young Vogt's alleged statement to the other detectives with Vogt merely agreeing to it - a practice even more psychologically coercive than simply using leading questions. Here, Vogt's memory was apparently being refreshed by Lt. Willis'

supposed recapitulation; he was being "led" on more than just the answers to one or two questions.

In United States ex rel Castro v. LaVallee, supra, the court held that the petitioner's youthfulness, limited education and limited mental capacity, at a time when he faced prolonged interrogation by older, experienced and educated police officers, as well as detectives and assistant district attorneys, should be important factors to be considered by the Court in determining whether or not a defendant's statement, was a voluntary act on his part or the result of mental coercion.

Although in the present case, merely eight and not eleven hours, as in Castro, elapsed from the time Vogt was brought to the police station by two detectives to the time he was booked, the facts of the present case are quite similar to

those in Castro, supra. In that case the defendant was a Puerto Rican youth whose court-appointed psychiatrists described as possessing a "dull, normal intelligence" and lacking the intellectual resources to cope with a complex situation. He had I.Q. ratings of 79, 83 and 91.

In the present case we have a 17 year old junior high school dropout who was described by the court-appointed psychiatrist as having a sociopathic personality, having an I.Q. of between 70 and 80, and being unable to adjust to society on a number of levels. The psychiatrist also stated that Vogt could have confessed to a crime he did not commit.

While young Edward Vogt, captive and counselless, sat at the police station and was later conveyed by seven or eight detective to his home and then to the

scene of the crime, his captors were eagerly and unlawfully clinching their case against him. This type of interrogation and police conduct smacks of the type of overreaching and overzealousness that has been repeatedly condemned as constitutionally impermissible. See Haynes v. Washington, 373 U.S. 503 (1963).

At no time was Edward Vogt given what is now called the Miranda warnings. He was not told that he could remain silent or that anything he did say would be used against him. He was not told that he could have the advise of counsel if he so desired. In fact, the detectives deliberately kept the petitioner's lawyer from him.

This failure to apprise the petitioner of his rights is particularly significant in this case. His gross intellectual immaturity made it obvious and

likely that he did not know what his rights were.

In Davis v. State of North Carolina, 384 U.S. 737, 86 S. Ct. 1761 (1966) Chief Justice Warren writing for the majority stated:

> The review of voluntariness in cases in which the trial was held prior to our decisions in Escobedo and Miranda is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation as is now required by Miranda, is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness.

384 U.S. at 740-741; 86 S.Ct. 1764

The entire course of conduct engaged in by the detectives indicates an intentional effort to take advantage of this immature youth. Nothing was done to protect him from the obviously coercive influence of the stationhouse atmosphere,

the steady interrogation by a number of policemen, the ruse of contradicting statements, and his own ignorance of his constitutional rights. The continual presence of newsmen and photographers who accompanied Vogt and the detectives to his home, must also have had an effect. The refusal of the police to allow Vogt's attorney to see him, even after he had allegedly confessed, is convincing evidence of the intent to keep this handicapped youth in ignorance and fear.

All of the circumstances of this case reduce the likelihood that Edward Vogt's confession resulted from a free and unrestrained choice on his part.

Although Detective Willis swore that Vogt was not under arrest and was free to go, that assertion is ridiculous in light of the evidence that he was at all times accompanied by an officer, even when he went to the bathroom - and that

his lawyer was denied access to him.

Detective Willis testified that the petitioner actually admitted the crime to him after more than an hour's steady interrogation by six or more detectives. This alleged confession was actually made only to Detective Willis. The testimony at trial indicated that when the other officers returned to the room, Willis repeated the alleged confession and Vogt merely acceded.

It is curious and possibly significant that it took the assembled detectives more than seven hours to bring this seemingly cooperating youth before an Assistant District Attorney to record his statement. The detectives continued to seek more incriminatory statements to secure their case.

The entire behavior of the detectives contradicts their assertion that Vogt had acted out of a free and unrestrained

will. These men were dealing with a child. He had the body of a seventeen year old, but his diminished intellect gave Edward Vogt the ability of an eleven year old in dealing with the situation. The detectives took advantage of Vogt's simpleness by contradicting his assertions of innocence with alleged statements of other "witnesses". These statements later turned out to be fictitious and the contradictions merely a ruse.

When the facts and circumstances of Edward Vogt's confession are analyzed, the totality of the circumstances show that the confession was not voluntary.

2. Police interrogation leading to a confession rarely if ever is enacted in the presence of counsel. The fact that the accused confessed in the absence of counsel is regarded as one of the elements in determining from all the surrounding circumstances whether the

confession was involuntary. United States ex rel Latham v. Deegan, N.Y.L.J. (Nov. 16, 1971) (2d Cir.); Crooker v. California, 357 U.S. 433; Cicenia v. Legay, 357 U.S. 504. Denial of counsel by itself is admittedly not sufficient to exclude the confession.

Concomitant with recent holdings that an accused must have a lawyer if he so desires at all stages of procedure, Gideon v. Wainright, 372 U.S. 335, and at such pretrial court proceedings as arraignment, Hamilton v. Alabama, 368 U.S. 52, the courts have recognized that counsel is needed at the point of arrest to protect the constitutional rights of the accused at the police station. "The right to use counsel at the formal trial," the Supreme Court has said, "would be a very hollow thing [if], for all practical purposes, the convic-

tion is already assured by pretrial examination." Escobedo v. Illinois, 378 U.S. 478. A confession obtained after denial of the right to counsel, under the present cases, is inadmissible even though there is no other evidence of coercion. Cf. People v. Gunner, 15 N.Y. 2d 226.

The New York Court of Appeals in People v. Donovan, 13 N.Y. 2d 148, 193 N.E. 2d 628 (1963) has held:

> Incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together ... denies the accused the effective assistance of counsel [and] contravenes the basic dictates of fairness in the conduct of persons charged with crime.

The court further added:

> [O]ne of the most important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self-incrimination and prevent the deprivation of that and other rights which may ensue

> from such detention. It would be highly incongrous if our system of justice permitted the district attorney to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police.

Although such advice and warnings prior to Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) were not compulsory, nevertheless the failure to give them is a significant factor in determining the issue of voluntariness, United States ex rel Castro, 282 F. Supp. 718 (S.D.N.Y. 1968).

In the present case, Vogt's age of seventeen years, his limited education, and mental capacity must be considered, along with the fact that he was being interrogated by a battery of mature and experienced police officials seeking to induce him to incriminate himself, when determining the question of voluntariness.

It is also important to consider the fact that the defendant was told by his mother just before he left his home for the second and last time, accompanied by the detectives, that she would call Bill Kummer who was their attorney. Although the attorney did arrive, Vogt never saw him until he was booked.

William Kummer, the attorney retained by Vogt's mother arrived at the stationhouse at approximately 8:00 P.M. while Vogt was being held. He was not permitted to speak to or advise the defendant until 11:45 P.M., which was after the time when Vogt was booked.

Vogt was then taken to Jewish Memorial Hospital where he is alleged to have made an incriminating statement to a nurse on duty. The statement was introduced into evidence over defense objections. This statement, that Vogt said he had hurt his ankle going over a roof,

made after the police knew his counsel was in the case with him and had denied him access to the accused, played a vital role in the chain of the prosecution's case.

Moreover, it is significant that at the time Vogt is alleged to have made this statement in the hospital, he was accompanied by several policemen. The nurse admitted that it was possible that a policeman may have made the statement.

Nonetheless, Justice Sarafite simply stated in his decision that:

> ... it is clear that the statement is admissible on the ground that it was made to a person who is not a law enforcement agent.

In view of Vogt's youth and limited mental capacity, he could not be compared to an adult who might have had some understanding of the consequences of his own admissions. An adult friend, appreciating the seriousness of Vogt's predi-

cament, would undoubtedly advise him not to talk until a lawyer could be obtained. Certainly, legal counsel would have advised him to stand on his constitutional rights.

3. Denial of effective assistance of counsel at petitioner's Huntley Hearing.

After the New York Court of Appeals ordered a Huntley Hearing for petitioner, counsel was appointed by the court to represent the petitioner at the hearing. Said counsel moved for a reasonable adjournment to locate and investigate witnesses and to fully prepare for this hearing. Despite the fact that counsel was newly appointed and that the facts around petitioner's statements involved a plethora of issues and possible or potential witnesses, the court denied counsel's motion and ordered the hearing to proceed as scheduled.

People v. Huntley, 15 N.Y. 2d 72, clearly includes the right to full and effective assistance of counsel as an essential element in a fair and just hearing. Not only must assigned counsel be adequate and effective, Gideon v. Wainwright, 372 U.S. 335 (1963), but should the state fail to ensure fully adequate representation as required, such state action would constitute violation of both the Fourteenth and Sixth Amendments. Powell v. Alabama, 287 U.S. 45 (1938).

In the case at bar, the court, having already tried the case, saw no reason for the adjournment sought by petitioner's assigned counsel. But assigned counsel was new to his client, the case and the myriad facts and persons involved in the issue of the voluntariness of petitioner's statements. Called to the hearing without the opportunity to be prepared,

petitioner's assigned counsel was precluded from giving effective aid in both the preparation and trial of the hearing.

4. Petitioner was not afforded the right to an impartial hearing on the voluntariness of his alleged confession. The very same judge who presided at the original trial where the defendant was found guilty of murder in the first degree presided at the post-trial hearing. The trial judge heard all the People's testimony, heard the jury's verdict, read the probation report and sentenced the defendant to life imprisonment.

It is conceded that the procedure set down in People v. Huntley, 15 N.Y. 2d 72, states that where possible with respect to criminal trials already concluded, the new hearing as to the voluntariness of the confession received in evidence

against the appellant should be held before the judge who previously presided at voir dire, or trial proper.

However, the reason for that policy is technical rather than substantive. The trial judge should be available to set the record straight as to misstatements by the defendant as to what occurred at the previous trial or hearing. This is especially necessary where the conviction attacked is ancient and its stenographic records are inadequate, and there is nothing to refer to except the trial judge's memory and diary. See Confessions in Criminal Cases, N.Y.L.J., February 16, 1965.

Certainly, the spirit of Jackson v. Denno, 378 U.S. 368 (1964) requires that the hearing judge determine the voluntariness of the alleged confession without going into the issue of its truth

or falsity and all the facts of the alleged crime. Id. at 376, 377. The procedure laid down in People v. Huntley for the conduct of a hearing in future cases affords the defendant a hearing on the voluntariness of his confession before a judge who has had no prior substantial contact with the case.

In United States of America v. Honorable Frederick van Pelt Bryan, United States of America v. Carl Simon, 393 F. 2d 90, 91 (2d Cir. 1968), this Court held per curiam that, "... in a multi-judge district such as the Southern District of New York where the necessity of retrial before the same judge is not present, the practice of retrial before a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." (Emphasis added)

In the present case, it appears from Justice Sarafite's opinion that he had already formed hard and fast notions as to Vogt's character and veracity before the 1965 Huntley Hearing.

As Justice Sarafite wrote:

> The Court recalls vividly the demeanor and behavior of the witnesses, including the defendant, at the trial. Despite his youth, it was quite clear in the courtroom that the defendant was not a person who was unaccustomed to the language he attributed to the police officers, and certainly not one to be frightened easily. (Emphasis added)

Justice Sarafite formed his own opinions about Edward Vogt from the weeks of trial. Edward Vogt's demeanor at trial was not the proper basis upon which the Huntley Hearing decision should have been rendered. What "appeared" to the judge to be "quite clear" is obviously not relevant to the question of coercion.

The Court may have been correct in its analysis of Edward Vogt, or it might not have been. Our system of justice provides that decisions are to be based on testimony of witnesses and their demeanor. That Judge Sarafite based his decision on an element as etherreal as a petitioner's behavior at a prior time, is clear evidence of the impropriety of allowing a trial judge to make a post-trial motion decision.

The Court's decision was admittedly based on information obtained outside the hearing. It indicates a predisposition which is improper under the circumstances.

Segments of Justice Sarafite's opinion illustrate that a judge is human and cannot help but be, at least subconsciously, influenced by his earlier acquired knowledge of the defendant's past and by the highly prejudicial hearsay

information contained in the probation report, which the trial court seemed to remember well.

Appellant was deprived of his right to a fair and impartial hearing on the singular issue of the voluntariness of his statements in light of the circumstances and facts of this case and subsequent hearing.

## Conclusion

The Petition for Certiorari should be granted for the foregoing reasons.

Respectfully submitted,

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OPINION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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EDWARD VOGT,
Petitioner,

v.

RUSSELL G. OSWALD, Commissioner,
New York Department of Correctional
Services
and

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J. E. LA VALLEE, Superintendent,
Clinton Correctional Facility,
Dannemora, New York,
Respondents.

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General of Counsel

EDMUND PORT, Judge

OPINION

Memorandum-Decision and Order

Edward Vogt, claiming that the judgment of conviction under which he is presently confined in the Clinton Correctional Facility, Dannemora, New York, is constitutionally infirm, has petitioned for a writ of federal habeas corpus.

Upon the filing of the petition, a show cause order was issued. Upon the return day thereof, oral agreement was heard. The matter has been briefed and the relevant state court records have been received. The matter is ready for decision.[1]

The petitioner was convicted in the New York County Supreme Court, after a jury trial, of Murder 1st degree on August 7, 1961 and sentenced to life

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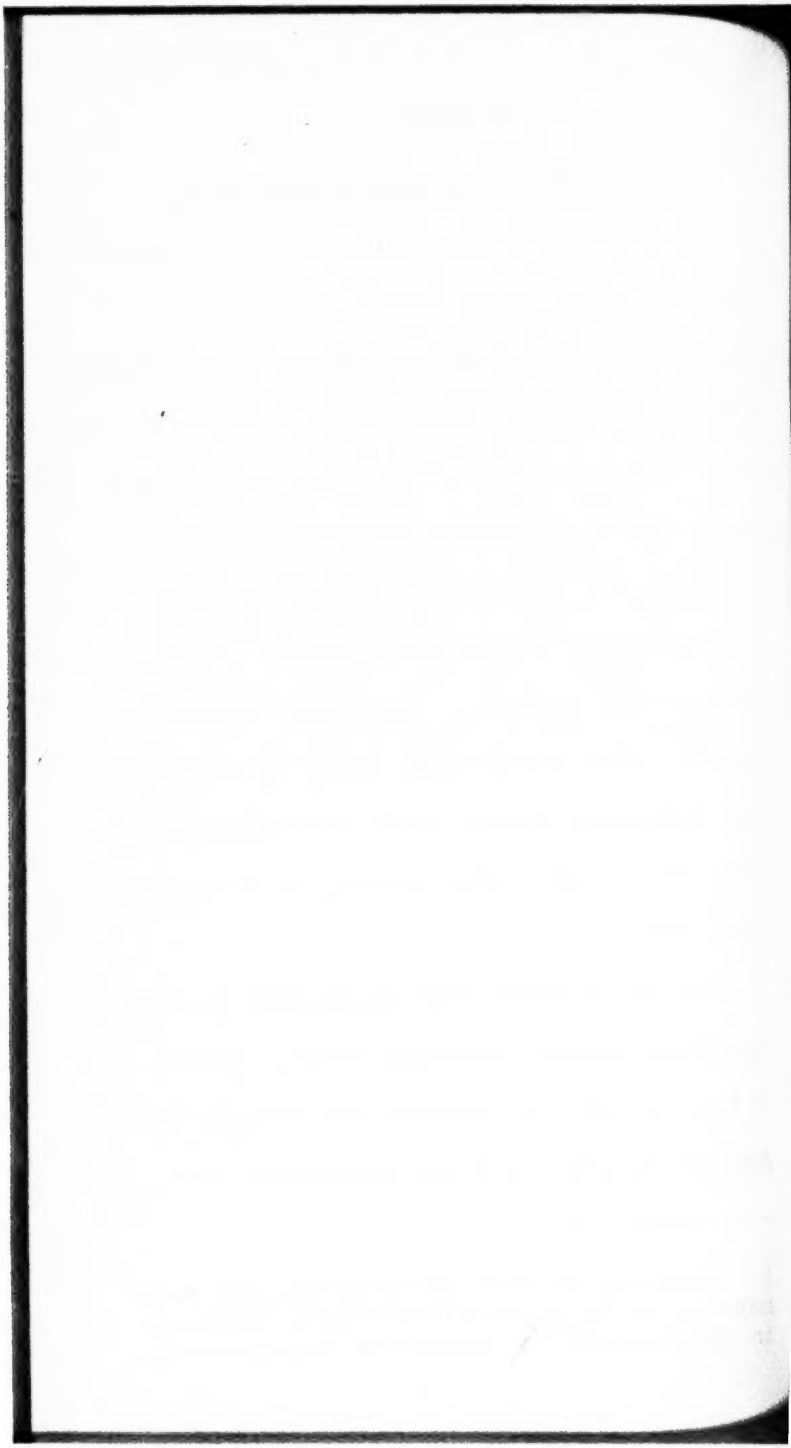
1. Because of the determinations made herein, a de novo evidentiary hearing in this court is rendered unnecessary.



OPINION

imprisonment. The Appellate Division affirmed People v. Vogt, 19 A.D. 2d 696, 241 N.Y.S. 2d 1007 (1st Dept. 1963). The Court of Appeals withheld decision and remitted the case to the trial court for a "Huntley"hearing. People v. Vogt, 15 N.Y. 2d 725, 256 N.Y.S. 2d 938 (1965). After a "Huntley" hearing, Justice Joseph Sarafite found the contested statements to have been voluntarily made, and an order was entered to that effect on October 26, 1965. The Appellate Division affirmed the order. People v. Vogt, 31 A.D. 2d 787, 298 N.Y.S. 2d 461 (1st Dept. 1969). The Court of Appeals affirmed. People v. Vogt, 27 N.Y. 2d 955, 318 N.Y.S. 2d 324 (1970).

Petitioner makes these claims:

(A) involuntary statements were admitted against him on his trial;

(B) denial of effectual assistance of counsel in that:

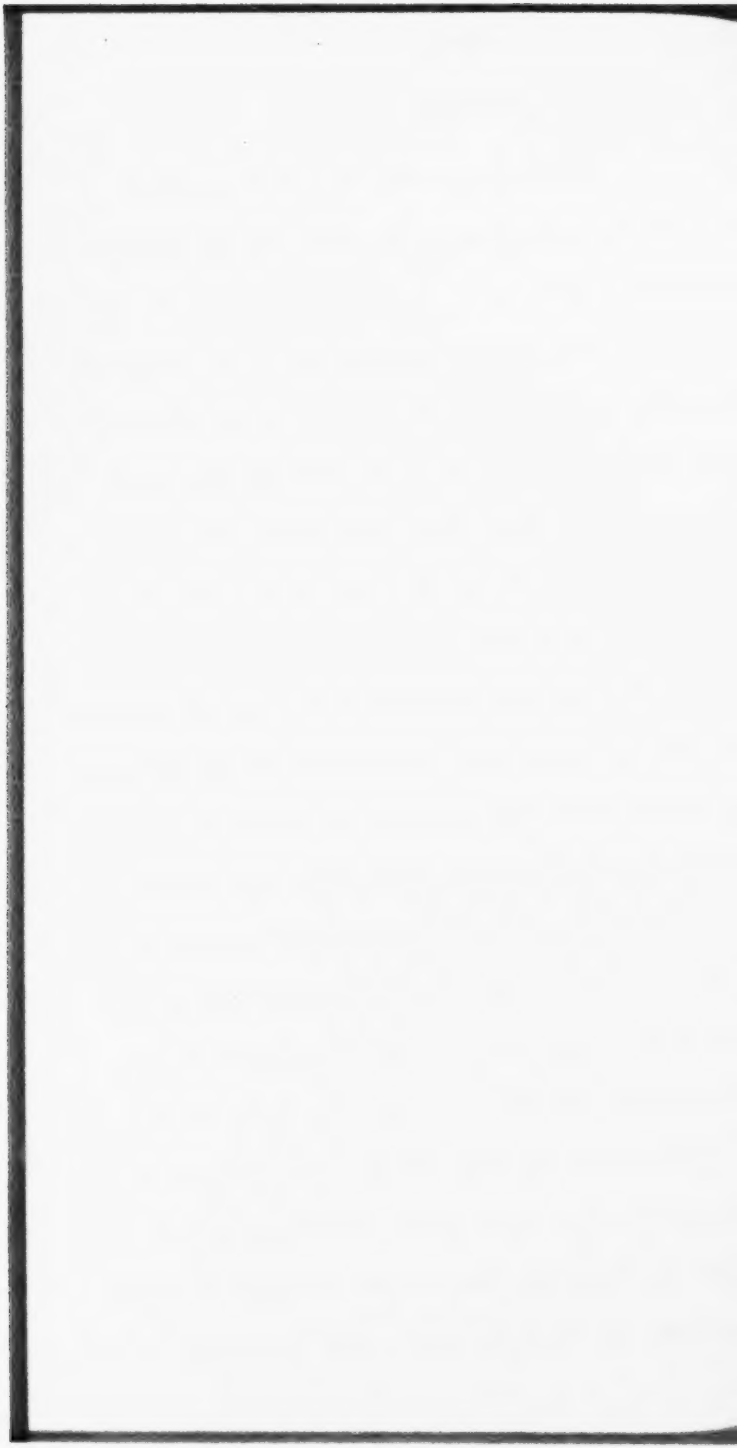
OPINION

(1) his attorney was denied access to him while he was being interrogated, and

(2) his counsel at the "Huntley" hearing was denied a reasonable adjournment in order to locate witnesses and properly prepare for the hearing;

(C) denial of a fair and impartial "Huntley" hearing.

The facts are essentially as follows: the petitioner was arrested on December 27, 1960 for the murder of Robert Guittari, a 14-year-old boy, on December 23, 1960. Petitioner was brought to Police Headquarters at approximately 3:10 p.m., gave a verbal confession to the Police by approximately 5:10 p.m., was returned to his home and mother at approximately 6:00 p.m. whereupon he again confessed the crime to her in the presence of the Police, and between



6:00 to 7:00 p.m. took the Police to the scene of the crime where he reenacted it for them.

Later that evening at about 9:15 p.m. petitioner gave another statement to an Assistant District Attorney which was recorded stenographically.[2] At about 12:20 a.m. on December 28, 1960, petitioner was taken to a hospital for an ankle injury where he made another incriminating statement to a civilian nurse.

The claim is made that the oral statements to the police and to his mother, the reenactment of the crime, and the statement to the nurse should

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2. The stenographic statement was suppressed at the trial for the reason that it was taken after the petitioner's attorney had arrived at Police Headquarters but was denied the right to see the petitioner.

have been suppressed. Petitioner asserts that they were all made as a result of duress, threats, pressure and psychological compulsion.[3] On the trial, the police asserted the direct opposite, i.e., that the statements had been made voluntarily and without coercion or compulsion of any nature.

Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964) are, of course, inapplicable to the petitioner's case. Johnson v. New Jersey, 384 U.S. 719 (1966). The applicable standard to be applied herein is "the totality of the circumstances." See, e.g. Frazier v. Cupp, 394 U.S. 731, 739 (1969).

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3. Petitioner does not allege that any actual physical force or violence was used against him.

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Judge Sarafite, at the conclusion of
e "Huntley" hearing, specifically
und: (1) that the police officers
d not make any threat to the petition-
, and (2) that the petitioner was not
fear when he made the statements to
e police; he then concluded, beyond
reasonable doubt, that the statements
de to the police were made voluntari-
and were not made under the influence
fear produced by any threats, vio-
nce, coercion, or mistreatment of any
nd. Insofar as the statement to the
rse was concerned, Judge Sarafite
ld it admissible on the ground that it
s made to a person who was not a law
forcement agent.[4] Finally, Judge Sara-

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In my opinion, the result reached by
dge Sarafite was correct. The testi-
y at the petitioner's trial, which
credited and believed by Judge Sara-
e, was merely to the effect that the
rse routinely asked petitioner what
happened, to which he responded:

fite flatly stated that he believed the police officers' version of the facts and disbelieved the petitioner's testimony.

Insofar as the claim regarding involuntary statements is concerned, I have fully reviewed the pertinent state court records[5] in this matter I am of the opinion that the petitioner has had a full and fair hearing that resulted in reliable findings by the state court, which are fully supported by the record. Townsend v. Sain, 372 U.S. 293 (1963). The petitioner has failed to overcome the statutory presumption of correct-

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"I hurt my ankle going over a roof." No claim is made that the nurse was a ruse used by police to entrap petitioner into making an incriminatory statement.

5. Including both the transcript of the "Huntley" hearing and the two volumes of trial transcript.

ness applicable to the state court determination. 28 U.S.C. §2254(d).

The claim regarding effective assistance of counsel will also be denied. The stenographic statement taken after counsel arrived at Police Headquarters was suppressed; the absence of counsel when the other statements were taken is but one of the "totality of the circumstances" to be considered. See Clewis v. Texas, 386 U.S. 707, 708-09 (1967); Davis v. North Carolina, 384 U.S. 737, 740-41 (1966). The contention that petitioner was denied effective assistance of counsel in that counsel at the "Huntley" hearing was refused a reasonable adjournment to find witnesses and to properly prepare for the hearing is completely frivolous, as an examination of the "Huntley" hearing transcript

easily reveals. See Huntley Transcript at pp. 1-17 and 30-32.

The final claim of the petitioner is that he was denied a fair "Huntley" hearing because it was conducted by the same justice who presided at the trial, on the basis of the evidence received on the trial together with additional evidence. This claim cannot withstand even casual scrutiny.

People v. Huntley, 15 N.Y. 2d 72, 77, 255 N.Y.S. 2d 838, 843 (1965), prescribes the very procedures used. Since it is permissible to use the trial record as evidence instead of introducing the same proof de novo, doing this before the judge who initially heard the evidence eliminates the objection that the case is being decided on the "cold" record, which is certainly to be avoided, if possible, where credibility is a factor.

OPINION

In addition, no objection was raised to the use of this procedure.

For the reasons herein, it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed.

/s/ Edmund Port

United States Dist. Judge

Dated: February 27, 1973
Auburn, New York

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6. The state court trial transcript and the other related state court records in this case are being returned by this court to Mr. Robert T. Johnson, Court Clerk, Criminal Term, New York County Supreme Court, Room 1000, 100 Centre Street, New York, New York 10013, pursuant to the latter's request. The court expresses its appreciation to Mr. Johnson for his cooperation and assistance in providing the state court records herein.

ORDER

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

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At a Stated Term of the Untied States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of November, one thousand nine hundred and seventy-three. Present:

HON. STERRY R. WATERMAN
HON. HENRY J. FRIENDLY
HON. WILLIAM H. EIMBERS

Circuit Judges.

EDWARD VOGT,

Petitioner-Appellant,

v.

RUSSELL G. OSWALD, Commissioner of the New York Department of Correctional Services

and

J. E. LAVALLEE, Superintendent, Clinton Correctional Facility,

Respondents.

Appeal from the United States District Court for the Northern District of New York.

ORDER

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is Affirmed. See 28 U.S.C. §2254(d).

/s/ Sterry R. Waterman

/s/ Henry J. Friendly

/s/ William H. Timbers